WELK PARK NORTH, d.b.a. WELK RESORT GROUP,
LAWRENCE WELK DESERT OASIS
v.
ACTING SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-81-A Decided June 27, 1996

Appeal from a decision affirming an increase in administrative fees for processing lease documents.

Dismissed.

1. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs or an Indian tribe.

2. Board of Indian Appeals: Generally--Indians: Generally

The Board of Indian Appeals has a well-established practice of declining to consider arguments or issues raised for the first time on appeal.

3. Indians: Leases and Permits: Administrative Fees

Under 25 U.S.C. § 413 (1994), the Secretary of the Interior may collect reasonable fees in connection with the leasing of Indian land. When the expenses of the work are paid from Indian tribal funds, the fees collected are to be credited to such funds.

4. Board of Indian Appeals: Generally--Indians: Leases and Permits: Administrative Fees--Indians: Tribal Powers: Tribal Sovereignty

The Board of Indian Appeals has authority to abstain in a case concerning administrative fees set by an Indian tribe under 25 CFR 162.13(b) when it finds that the matter at issue affects tribal self-government and should therefore be addressed by a tribal forum.

APPEARANCES: Anthony Cohen, Esq., Santa Rosa, California, for appellant; Art Bunce, Esq., Escondido, California, for the Agua Caliente Band of Cahuilla Indians.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Welk Park North, d.b.a. Welk Resort Group, Lawrence Welk Desert Oasis, seeks review of a January 19, 1995, decision of the Acting Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming an increase in administrative fees for processing lease and sublease documents on the Agua Caliente Reservation. For the reasons discussed below, the Board dismisses this appeal.

Background

Appellant holds a business sublease under Palm Springs Lease PSL-149. 1/ Paragraph 5 of the business sublease states that the purposes of the sublease are: "Operation of the Premises as a golf and tennis country club, open for public use, operation as a condominium project and as a timeshare project with restaurant, office and hotel uses, and operation for any other purpose permitted by zoning ordinances which are applicable to the Premises."

Appellant's sublease was approved on April 25, 1990, by the Director, Palm Springs Field Office, BIA (Office Director). On November 7, 1990, the Office Director approved a form sublease for appellant to use in selling timeshare subleases of its condominium units. Appellant maintains 162 condominium units and sells timeshares in one-week increments.

The Agua Caliente Band of Cahuilla Indians (Tribe) performs certain realty functions for BIA under a Memorandum of Agreement (MOA) which is renewed and/or revised periodically. The MOA relevant to this appeal covered the period January 1, 1993, through December 31, 1994. It provided that the Tribe would make payment to its employees, contractors, and vendors for services rendered, and that BIA would reimburse the Tribe for these payments plus 15 percent for the Tribe's direct and indirect costs. The payments were to be made from administrative fees collected by BIA pursuant to 25 U.S.C. § 413 (1994) 2/ and 25 CFR 162.13(b)(1). Although the setting of fees is not specifically addressed in the MOA, the Tribe has traditionally established a fee schedule, which has been approved by BIA. 3/

1/ Lease PSL-149 was approved in 1971. The present lessee is Falcon Lake Properties. The lessors are Ruth Elaine Patencio, Belinda Segundo Short, Georgiana Ellen Rice Ward, Debrah Gonzales Purnel, Leonard Charles Bow, Lawrence Joseph Bow, Darlene Marie Diaz Ruiz, and Frances Diaz Edwards Cummings.

For a brief history of Lease PSL-149, see Falcon Lake Properties v. Assistant Secretary - Indian Affairs, 15 IBIA 286 (1987).

2/ All further references to the United States Code are to the 1994 edition.

3/ The Tribe has established the fee schedule for leasing on the Agua Caliente Reservation at least since 1965. The earliest document in the record for this appeal is a Mar. 1, 1966, tribal resolution, approved by the Area Director on Mar. 8, 1966. That resolution revised a fee schedule which had been established in a Sept. 7, 1965, tribal resolution, approved by the Area Director on Sept. 23, 1965.

The realty functions performed by the Tribe under the MOA include processing documents related to subleases, including timeshare subleases, preparatory to BIA approval of the documents and recording in BIA land records. At the time appellant entered into its business sublease, the Tribe's fee for processing timeshare sublease documents was $40 per document (Appellant's June 3, 1993, Letter to the Tribal Chairman and Nov. 15, 1993, Letter to the Office Director).

The record indicates that the Tribe adopted a new fee schedule in Resolution 52-92, dated December 1, 1992. 4/ The schedule was approved by the Office Director on December 16, 1992, and was to become effective on January 15, 1993. The charges for residential subleases, including timeshare subleases, were, as relevant to this appeal, $150 for a sublease, $100 for a deed of trust with 7-day turnaround, $150 for a deed of trust with 24-hour turnaround, and $300 for immediate processing of a deed of trust. In the case of appellant's timeshare subleases, the new fees, in most cases, result in a total charge of $250-350 per transaction, because each sublease package includes the sublease itself and either one or two deeds of trust. Under the previous schedule, appellant paid $80-120 per transaction. 5/

Apparently, there was initial uncertainty as to whether the new fees would apply to appellant's timeshare subleases. See Appellant's December 28, 1992, and January 11, 1993, letters to the Office Director. By June 1993, the question had been resolved. On June 2, 1993, the Office Director wrote to appellant, stating that, as of June 15, 1993, appellant would be required to pay the new fees. At BIA's suggestion, appellant sought a meeting with the Tribal Council to discuss the fee increase. The Tribal Council referred the matter to the Tribe's Planning Commission, which evidently informed appellant that it intended to refer the matter back to BIA. 6/ Recounting this sequence of referrals in a June 14, 1993, letter to the Office Director, appellant asked for a meeting with BIA staff. The Office Director responded on June 17, 1993, stating:

> The Bureau of Indian Affairs does not determine the fees to be charged. Those fees are determined, after much review and consideration, by the Tribal Council. When they recommended the

---

4/ No copy of this resolution is included in the record.

5/ No copy of the previous fee schedule is included in the record. However, according to the report of a study commissioned by the Tribe, the fees in 1991 were $40 per document for timeshare subleases and $85 per document for other residential subleases, "although a similar amount of processing time and work was involved" for the two types of subleases (Franklin Report at 1 (see further discussion of this report infra)).

6/ Several months later, the Tribe's Planning commission agreed to meet with appellant. At the meeting, which took place on Feb. 7, 1994, appellant requested that the Tribe "(1) revise the fee schedule to reflect the actual and reasonable cost to process the documents and (2) direct the BIA to refund to [appellant] the amounts it has paid in excess of the actual and reasonable costs" (Appellant's Presentation to Tribe's Planning Commission at 2). At that time, the Planning Commission advised appellant that a study was underway concerning the fees.

> new fees in December 1992 they did so knowing that timeshare projects had been charged a lower fee at their inception to assist them in starting their projects. After the program was in effect it became apparent that these projects require the most attention due to the amount of time spent monitoring the project and keeping title to the timeshares straight. By starting your new program of offering alternate year vacation units our workload will double.
>
> Unless and until the Tribal Council amends their Administrative Fee Schedule the charges listed on the December 16, 1992 schedule will remain in full force.

On November 15, 1993, appellant wrote to the Office Director, stating that it wished to invoke the arbitration provision of the master lease with respect to the increase in administrative fees. 7/ The Office Director responded on December 1, 1993, stating that the arbitration provision was inapplicable to the question of administrative fees and that "the fees established by the Agua Caliente Band of Cahuilla Indians will be adhered to by this office."

On December 15, 1993, appellant wrote to the Office Director, again objecting to the increase in fees and asking to review the costs upon which the increase was based. On December 31, 1993, appellant appealed the Office Director's December 1, 1993, letter to the Area Director.

Some time after it had filed its notice of appeal and statement of reasons, but before the Area Director had issued a decision, appellant obtained a declaration from a former employee of the Tribal Employees Supplemental Account (TESA), the tribal organization which performs the realty services at issue here. The declaration, dated July 14, 1994, stated that the former employee had estimated the amount of time and the cost for each step in processing sublease documents and had concluded that the cost of processing each document was $11.53. By letter of July 14, 1994, appellant asked the Area Director to consider the declaration in connection with its appeal.

The Tribe, which had not to this point participated in the appeal, requested permission to respond to the former employee's declaration. The Area Director granted permission, and the Tribe submitted a response on September 16, 1994, to which it attached a report of a study the Tribe had commissioned from Dr. Donald R. Franklin, an industrial/organizational consultant. The report, dated September 14, 1994, is entitled "An Eval-

---

7/ Article 28 of PSL-149 provides:

"Whenever the terms of this lease require that a dispute be settled by arbitration, an Arbitration Board will be established, consisting of three members, one each to be selected by the Lessor and the Lessee, and such members to select the third member. The costs of such Arbitration Board shall he shared equally by the Lessee and the Lessor. The Secretary shall be expected to accept decisions reached by said Arbitration Board, but he shall not be bound by any decision which might be in conflict with the interests of the Indians or the United States."

uation of Timeshare Document-Processing Costs in the Agua Caliente Tribe of Cahuilla Indians within the Palm Springs Field Office of the Bureau of Indian Affairs" (Franklin Report).

Dr. Franklin entirely rejected the former employee's conclusions, finding them to be based upon a flawed conception as well as a methodology which was "casual, incomplete, and inaccurate" (Franklin Report at 2). Dr. Franklin described his own study as employing two approaches:

> 1. The cost versus income approach: an examination of the overall costs of personnel, rent, equipment and other "hard" costs associated with processing timeshare subleases over a specific sample time period, compared with the fee income for documents received and processed over that same time period;
>
> 2. The comparable service cost approach: an examination of the fees for similar services charged by other providers of that service in the local economy.

(Id. at 3).

For Approach 1, Dr. Franklin studied a 3-week period in January 1994. He concluded: "The results of this study suggest that the income received over a typical three-week period in January, 1993 [sic], was greater than the directly-measurable and estimated costs involved in handling and processing those documents using a model and estimates appropriate to the functions studied" (Id. at 21).

For Approach 2, Dr. Franklin contacted escrow and title agencies concerning their fee schedules. He then estimated "what these agencies would charge for processing the timeshare documents currently handled by the BIA/TESA system" (Id. at 19). His estimates for four such agencies ranged from $353 to $549 per party per transaction. In each case, Dr. Franklin stated, the agencies billed both parties to the transaction, resulting in total fees ranging from $706 to $1098.

Stating that "the timeshare document-processing operation must be given an amount of leeway to balance income with expenses over the long run, not the short run as represented by the necessarily restricted scope of this study" (Id. at 21), Dr. Franklin concluded that "the fees charged for processing timeshare documents, while they exceed estimated current operational costs, are eminently reasonable at this point, but should be re-evaluated regularly for necessary adjustment to reflect changes in the cost of living" (Id. at 22).

Appellant requested and was given a two-week period in which to respond to the Franklin Report. Appellant submitted a number of objections, as well as a declaration from Roger A. Britt, a senior analyst in the office of appellant's attorney. Britt criticized Dr. Franklin's data collection techniques. He also concluded that the results of Dr. Franklin's three-week study, if extrapolated over a 12-month period, would show that the Tribe received $383,227 more than it spent to process timeshare documents. With respect to Dr. Franklin's Approach 2, Britt stated that he had contacted

several escrow and title companies, which would not provide the kind of services provided by BIA/TESA unless title insurance were purchased at the same time. Britt further stated that the price quotations obtained by Dr. Franklin "appear to contain services which are not provided by either BIA or TESA" (Sept. 29, 1994, Britt Declaration at 3).

The Area Director issued his decision on January 19, 1995. He rejected a contention made by appellant that, because the Office Director had preapproved the form upon which the timeshare subleases were prepared, no fees could be charged for processing the individual timeshare subleases. He observed that appellant had acknowledged in Article 13.A of its business sublease that transfer fees might be required for timeshare subleases. 8/ He continued:

> The leasing of timeshare units (subleases) are title documents that affect the title to Indian land and are required to be recorded by regulation. The purpose of recording is to provide evidence of a transaction, event, or happening that affects land titles; to preserve a record of the title document; and to give constructive notice of the ownership, change of ownership, and the existence of encumbrances to the land. Appellant's argument that no fees are required on a preapproved sublease form fails.
>
> Therefore, the sole issue in this appeal involves the increase in administrative fees and if the increase in fees [is] unreasonable to cover the cost for processing subleases, specifically timeshare subleases.

(Area Director's Jan. 19, 1995, Decision at 6). After discussing the declaration of the former TESA employee, the Franklin Report and the Britt declaration, the Area Director concluded that appellant had failed to show that the administrative fees were unreasonable. He therefore affirmed the Office Director's approval of the fees.

Appellant then appealed to the Board. Appellant and the Tribe filed briefs.

Tribe's Indispensable Party Argument

The Tribe contends that this appeal should be dismissed for lack of an indispensable party, i.e., the Tribe. Although it characterizes itself as an absent party, the Tribe acknowledges that it participated in this appeal

---

8/ Article 13.A provides in part:

"Notwithstanding the foregoing [provisions requiring approval of subleases], Lessor and the Secretary, in approving this Business Sublease, hereby consent in advance to each sublease of a portion of Tract 18708 of the Premises to any purchaser of a Subdivision Interest, and to any assignment thereof, including, without limitation, a timeshare estate Subdivision Interest, provided that such sublease and assignment are made on a form which is preapproved by Lessor and the Secretary, and provided further that the required notices and the payment of transfer fees, if any, are made."

when the matter was pending before the Area Director. It contends, however, that the scope of the appeal, formerly limited to a challenge to the increase in fees, "has widened into a full-scale attack on the validity of the MOA itself, as well as seeking a massive refund which, if granted, would more than deplete the entire balance of the fund of such fees, and cause the Tribe to discontinue the program" (Tribe's Answer Brief at 6). As the Board understands the Tribe's argument, the Tribe is a willing participant in this appeal only insofar as it concerns a challenge to the fee increase.

Some of the Tribe's concerns might well be addressed through a determination of the issues which are properly before the Board in this appeal. Accordingly, before addressing the Tribe's argument, the Board turns to a consideration of the scope of this appeal.

Appellant denies that it challenges the validity of the MOA. Accordingly, the Board finds that the validity of the MOA is not at issue an this appeal.

Appellant does not deny that it seeks a refund. In fact, it explicitly seeks a refund of $1,812,980.00 plus interest, or a total of $2,181,918.05 (Appellant's Opening Brief at 3). Appellant seeks the refund from BIA (id.), even though it appears to recognize that BIA has already paid the funds collected from appellant (or most of them) over to the Tribe (Appellant's Reply Brief at 3).

[1] Clearly, if BIA no longer has the funds under its control, it cannot refund them to appellant. Thus appellant's claim is, in essence, a claim for damages. As it has often stated, the Board lacks authority to award money damages against BIA or any other party. E.g., U.S. Fish Corp. v. Eastern Area Director, 20 IBIA 93 (1991); Kays v. Acting Muskogee Area Director, 18 IBIA 431 (1990). The Board concludes that it lacks jurisdiction over appellant's request for a "refund" in this case.

[2] Some of the contentions now made by appellant are raised for the first time in this appeal. One of appellant's new arguments is that BIA is not entitled to collect administrative fees at all because it has not promulgated regulations under 31 U.S.C. § 9701 or 25 U.S.C. § 413. 9/ The Board has a well-established practice of declining to consider arguments or issues raised for the first time on appeal to the Board. E.g., Estate of Rufus Ricker, Jr., 29 IBIA 56 (1996); Joint Board of Control v. Acting Portland Area Director, 22 IBIA 22 (1992). The Board follows this practice to ensure that BIA has had an opportunity to rule on an issue before the Board addresses it.

9/ Appellant's contention that no regulations have been promulgated under 25 U.S.C. § 413 appears to be based upon a misreading of 25 CFR 162.13(b).
See Appellant's opening Brief at 7. Subsection 162.13(b), discussed further infra, is clearly intended to implement 25 U.S.C. § 413. In fact, this statutory provision has been cited as authority for the regulatory fee provision since the first edition of Title 25 of the Code of Federal Regulations was published in 1938.

In this case, it would be particularly inappropriate for the Board to abandon its usual practice, because appellant's new argument challenges a program that has been in place since 1929 or earlier, with respect to BIA-established fees, and since 1948, with respect to tribally established fees. See discussion infra. Clearly, BIA ought to have an opportunity to address this challenge to a longstanding BIA program before the Board undertakes to do so.

The Board observes as well that appellant makes this argument belatedly, not only in the context of this appeal, but also in the larger context of appellant's operations under its sublease. Appellant was aware that BIA charged administrative fees when it acquired its leasehold interest in 1990 and has paid these fees since it began sales of timeshare interests. 10/ Appellant agreed, in Article 13.A of its sublease, to pay the fees. It is at least arguable that, absent that agreement by appellant, the Office Director would not have approved the sublease. Under these circumstances, appellant ought to have raised its challenge to BIA's authority to impose the fees long before now.

Accordingly, the Board declines to address the issue of IBIA's authority to impose administrative fees.

Appellant also contends, for the first time in this appeal, that BIA may not delegate fee-setting authority to the Tribe and that the fees in this case constitute an unconstitutional tax. For the same reasons just discussed, the Board declines to address these issues.

The Board finds that the only issues properly before the Board are those relating to the increase in administrative fees approved by the Office Director on December 16, 1992.

The Tribe has willingly participated in this appeal insofar as the appeal challenges BIA's approval of the increase in fees. The Board finds that, when this appeal is narrowed to its proper scope, the Tribe is not an absent party. Therefore, no indispensable party question arises here.

Appellant's Motion to Strike Franklin Report or for Evidentiary Hearing

Appellant asks the Board either to strike the Franklin Report from the record or to order an evidentiary hearing at which appellant would be allowed to put on witnesses and cross-examine BIA and tribal witnesses.

Appellant states that it objects to consideration of the Franklin Report because it was not before the Office Director when he made his decision and because appellant was not allowed an opportunity to submit a report of equal magnitude or an opportunity to cross-examine Dr. Franklin when this matter was pending before the Area Director. Appellant also contends that it was improper for the Area Director to consider the Franklin Report because he had committed himself to base his decision upon appellant's filings and the record received from the Field Office.

10/ See, e.g., appellant's June 3, 1993, letter to the Tribal Chairman and its Nov. 15, 1993, letter to the Office Director.

As appellant contends, the Area Director stated in a July 8, 1994, letter that his decision would "be based upon the information that was received from the appellant and the Administrative Record submitted by our Palm Springs Field office." At the time this letter was written, appellant had filed its original notice of appeal and statement of reasons, as well as an amended notice of appeal and statement of reasons. The time for filing answers under 25 CFR 2.11 had expired, and no answers had been filed. Thus, at that point, it clearly appeared that the Area Director's decision would be based only upon appellant's filings and the record from the Field Office.

However, on July 14, 1994, appellant submitted the above-mentioned declaration of a former TESA employee and asked the Area Director to consider it. This submission was untimely under BIA's appeal regulations, and the Area Director might well have declined to consider it. However, to the extent the Area Director agreed to consider it, he was obligated to allow interested parties to submit responses, if for no other reason than that BIA's appeal regulations require that interested parties be given an opportunity to file answers. 25 CFR 2.11.

Appellant is in no position to complain about the Area Director's consideration of information which was not before the office Director, because appellant was the first to submit such information. Moreover, as noted above, appellant was granted the two weeks it requested to respond to the Tribe's submission. If appellant found that time insufficient to prepare an adequate response, such as a report of equal magnitude to the Franklin Report, it could and should have requested additional time from the Area Director.

The Board declines to strike the Franklin Report from the record.

In the alternative, appellant requests that the Board order an evidentiary hearing at which appellant would be authorized "to subpoena witnesses, to cross-examine Dr. Franklin and other BIA and tribal witnesses, and to put on evidence of its own, including testimony regarding the Lientz-Parkhill study" (Appellant's Motion to Strike Franklin Report at 2). The Lientz-Parkhill study, appellant states, is a study commissioned by appellant to analyze the Franklin Report.

Under 43 CFR 4.337(a), the Board may require a hearing "where the record indicates a need for further inquiry to resolve a genuine issue of material fact." In this case, appellant asserts that the Lientz-Parkhill study "brings crucial factual and analytical information * * * to the question of the reasonableness of the fees" (Appellant's Opening Brief at 20), and suggests that the results of this study are in conflict with the results of the Franklin study. Appellant does not, however, produce a copy of the Lientz-Parkhill report. 11/

11/ In its opening brief, appellant urges the Board to consider the results of the study, "either as a written report, or as testimony in an evidentiary hearing" (Id.). It therefore appears possible that appellant intended to attach the report to its opening brief. However, no copy was attached.

As discussed below, the Board concludes in this case that it should not review the reasonableness of the fees here. Even if it had found it appropriate to do so, however, the Board would be hard put to find, on the basis of appellant's bare assertions about the contents of the Lientz-Parkhill report, that the report demonstrates a genuine issue of material fact for which a hearing should be ordered. See, e.g., All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202, 212 (1992) ("The party requesting an evidentiary hearing mist affirmatively show the existence of a controversy concerning a genuine issue of material fact, the resolution of which is necessary for a decision in the appeal.")

Appellant's request for an evidentiary hearing before the Board is denied.

Statutory and Regulatory Provisions

The statutory and regulatory provisions relevant to this dispute are 25 U.S.C. § 413 and 25 CFR 162.13(b).

[3] 25 U.S.C. § 413 provides:

> The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue: Provided, That the amounts so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds.

25 U.S.C. § 413 derives from section I of the Act of Feb. 14, 1920, 41 Stat. 408, 415, as amended by the Act of Mar. 1, 1933, 47 Stat. 1417. The 1933 amendment, in the words of a 1946 Solicitor's Opinion, "had two purposes: (1) To amend the act of February 14, 1920 (41 Stat. 415), which made the collection of fees mandatory [and] (2) [t]o require fees for work paid for from Indian tribal funds to be credited to such funds." 12/

BIA has had regulations concerning the collection of administrative fees for leases at least since 1929. 13/ However, it was not until 1948 that BIA revised its regulation to address the "tribal funds" provision in

---

12/ Solicitor's Opinion, Dec. 6, 1946, 59 I.D. 328, 331, 2 Op. Sol. on Indian Affairs 1410, 1411, citing Senate Report No. 1204, 72d Cong., 2d Sess. (1933).

13/ 25 CFR 171.23, as it appeared in the 1938 edition of Title 25 of the Code of Federal Regulations, was derived from sec. 21 of the Secretary's May 9, 1929, regulations governing leasing and permitting of Indian lands. It imposed fees upon "the lessee, permittee, subclasses, or assignee." In 1941, section 171.23 was amended to impose fees upon the Indian lessor as

the 1933 amendment to 25 U.S.C. 413. The revision was published at 13 FR 829 (Feb. 25, 1948) and was codified at 25 CFR 171.16 (1949). It provided:

> Fees. When lands are leased or permits are issued in accordance with the provisions of this part, or when they are subleased or assigned (including renewals or extensions), fees shall be fixed as follows:
>
> (a) To be paid by lessee, permittee, sublessee, or assignee:
>
> [Schedule of fees and related provisions omitted.]
>
> (b) Fees, tribal employees. When the clerical and ministerial work in connection with the grants of leases or permits is performed by tribal employees paid from tribal funds, fees may be fixed, subject to approval by the Commissioner [of Indian Affairs] or his authorized representative, by the respective tribes concerned in lieu of the fees prescribed in paragraph (a) of this section.
>
> (c) Disposition of fees. Fees collected pursuant to paragraph (a) of this section shall be covered into the Treasury as miscellaneous receipts, except that when the expenses of the clerical and ministerial work in the issuance of permits or leases of lands under this part are paid from tribal funds, the fees shall be credited to such funds.

In a 1956 revision of 25 CFR Part 171, section 171.16 was renumbered, becoming section 171.28. 21 FR 2562 (Apr. 19, 1956). In a 1957 revision and redesignation of the leasing regulations, 25 CFR Part 171 became Part 131, and section 171.28 became section 131.28. 22 FR 10566 (Dec. 24, 1957).

The fee provision was amended at 26 FR 10966 (Nov. 23, 1961) and presently appears, as amended in 1961, at 25 CFR 162.13(b). The present section 162.13(b) provides:

> Unless otherwise provided in this part or by the Secretary, fees based upon the annual rental payable under the lease shall be collected on each lease, sublease, assignment, transfer, renewal, extension, modification, or other instrument issued in connection with the leasing or permitting of restricted lands under the regulations in this part.
>
> (1) Except where all or any part of the expenses of the work are paid from tribal funds, in which event an additional or alternate schedule of fees may be established subject to the approval of the Secretary, the fee to he paid shall be as follows:

---

fn. 13 (continued)
well as the "lessee, permittee, sublessee, or assignee." 6 FR 4096 (July 31, 1941). Although the 1941 revision was promulgated well after enactment of the 1933 amendment to 25 U.S.C. § 413, no mention was made of the "tribal funds" provision in the statute.

Rental	Percent
On the first $500	3
On the next $4,500	2
On all rental above $5,000	1

In no event shall the fee be less than $2.00 nor exceed $250.

It appears likely that the recognition of a tribal role in leasing, as it first appeared in the 1948 version of 25 CFR 171.16, was based in part upon the 1946 Solicitor's Opinion cited above. In that opinion, the Solicitor held that "at least so long as the Department retains general control of the leasing process, it may delegate to a tribal government its purely ministerial aspects" 59 I.D. at 337: 2 Op. Sol. on Indian Affairs at 1414-15. 14/

At about this time, i.e., the mid-1940's, some tribes were beginning to assume responsibility for clerical and ministerial leasing duties, including responsibility for the establishment of fee schedules. As discussed in a 1956 Solicitor's letter, the Devil's Lake Sioux Tribe established a Land Service Enterprise for these purposes in 1947. The Solicitor's letter quotes the tribal resolution establishing the enterprise, which shows that the Tribe undertook the project in part because BIA's "clerical services in connection with land and leasing work on the Fort Totten Indian Reservation have been greatly curtailed because of reductions in governmental appropriations and personnel" (Solicitor's Aug. 16, 1956, Letter to Rep. Usher L. Burdick, 2 Op. Sol. on Indian Affairs 1747-48). The Solicitor stated:

> The fees collected for clerical and ministerial work connected with the leasing of Indian land may, under 25 CFR 171.28(c), be credited to tribal funds when such funds have been appropriated by the tribe to pay employees who perform the work. This is the case at Fort Totten where revenue obtained from the enterprise is used by the tribe to defray the expenses of tribal government.
>
> Your letter refers to a complaint that someone is being charged an additional lease fee of from 5 percent to 10 percent greater than the regulation fees authorized by law. There is nothing in records available here to substantiate such a contention, inasmuch as the fees charged by the Tribal Land Enterprise are authorized, under an agreed plan of operation, to be collected in lieu of the schedule of fees prescribed in 25 CFR 171.28(a).

(2 Op. Sol. on Indian Affairs at 1748).

14/ The Solicitor noted: "In view of the substitution of tribal leasing clerks for Government leasing clerks, it would seem to be necessary, however, that further consideration be given to the question whether the regulations themselves should not be modified" 59 I.D. at 339, 2 Op. Sol. on Indian Affairs at 1415. The revised regulations appeared two years after this advice was given and clearly appear to be the result of the advice.

As stated in footnote 3, the Agua Caliente Band has been setting the lease fees on its reservation at least since September 1965. The Board has no information concerning other tribes which have undertaken to establish lease fees for their reservations.

Discussion and Conclusions

The thrust of appellant's challenge to the fee increase appears to be that the fees approved by the Office Director on December 16, 1992, at least as they are imposed on appellant, are not reasonable under 25 U.S.C. § 413 because they are in excess of the amount necessary to cover the costs of processing appellant's documents.

Appellant seems to assume that, to be "reasonable" within the meaning of section 413, a fee must be set no higher than the amount necessary to cover the cost of the service upon which the fee is imposed. The Tribe as well, at least insofar as it set the parameters of the report it commissioned from Dr. Franklin, apparently accepts the premise that the reasonableness of the fees is to be judged vis-a-vis the actual service performed at the time the fee is imposed.

It is not at all clear that the reasonableness of the fees imposed upon appellant must be directly equivalent to the actual costs of processing appellant's. documents. See, e.g., United States v. Sperry Corp. 493 U.S. 52, 60 (1989):

> This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied." Massachusetts v. United States, 435 U.S. 444, 463 n.19 (1978).

As noted above and more fully discussed below, the Board does not undertake here to determine whether the fees in this case are reasonable. Therefore, the Board finds it unnecessary to determine the meaning of the phrase "reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians" as it appears in 25 U.S.C. § 413. The Board observes, however, that the interpretation of section 413 apparently embraced by appellant and the Tribe is not the only possible one. The statute does not appear to require a direct equation between a fee and the cost of the precise service upon which the fee is imposed. Rather, it more broadly authorizes fees to cover the cost of any and all work performed, suggesting at least the possibility that the fees charged in cases such as this one might properly cover the cost of lease-related work other than the processing of lease documents, even though the fee is charged at the time the documents are processed. 15/

15/ BIA's duties do not end when the lease documents are processed. Some of BIA's subsequent tasks, such as lease monitoring, do not give rise to events upon which fees might easily be imposed. It is at least arguable

The Board, however, reaches no conclusion on this point. Instead, it turns to a consideration of its jurisdiction over the question of the reasonableness of the fees in this case and whether, if it has jurisdiction over the question, it should nevertheless refrain from exercising that jurisdiction.

In Kirschling v. Bureau of Indian Affairs, 7 IBIA 36 (1978), the only previous Board case to address 25.U.S.C. § 413, the Board found that it lacked jurisdiction to review the reasonableness of certain BIA-established fees because such a determination involved the exercise of discretionary authority. The fees at issue in Kirschling were assessed against the proceeds of the sale of Indian timber, under authority of 25 U.S.C. § 406(a), 25 U.S.C. § 413, and 25 CFR 141.18 (1976). 16/

It is arguable that, if the Board lacked authority to review the reasonableness of the BIA-established fees at issue in Kirschling, it has even less authority here because of the Tribe's involvement. Indeed, in recent years, the Board has followed the practice of abstaining from cases involving such matters as BIA approval of tribal ordinances, including ordinances imposing taxes on non-members, in deference to the Tribe's primary jurisdiction over the matter at issue. See, e.g., Big Horn Business Association v. Acting Billings Area Director, 28 IBIA 113 (1995); Zinke & Trumbo, Ltd. v. Phoenix Area Director, 27 IBIA 105 (1995); Burlington Northern Railroad v. Acting Billings Area Director, 25 IBIA 79 (1993). In these cases, the Board recognized, as have the Federal courts in cases concerning tribal jurisdictional issues, that parties seeking to challenge a tribal ordinance must take their challenge to a tribal forum before seeking relief from a Federal forum.

The Tribe's fee schedule in this case differs from a tribal tax ordinance in that, here, the fees are collected by BIA and are used to fund realty functions which otherwise would have to be funded from Federal appropriations. Arguably, because of its greater involvement, BIA has more responsibility for the reasonableness of the Tribe's fee schedule here than it would have for the reasonableness of taxes imposed by a tribal tax ordinance.

---

fn. 15 (continued)
that 25 U.S.C. § 413 permits BIA, or a Tribe, to impose an administrative fee at a certain point in a lease relationship, such as upon initial document processing, even though the fee is used to offset anticipated lease services in addition to the actual service upon which the fee is imposed. 16/ A claim that these administrative fees were excessive, as well as other claims concerning BIA's management of timber on the Quinault Reservation, eventually reached the Supreme Court. See, in particular, United States v. Mitchell, 463 U.S. 206, 222-23 n.23 (1983), and Mitchell v. United States, 664 F.2d 265, 274, 276 (Ct.Cl. 1981).

Yet, while BIA has a role here, it is the Tribe which has primary responsibility for setting the fees and performing the work which the fees support. The Tribe exercises its own governmental authority in setting the fees, even though it does not collect the fees itself. 17/ Further, the Tribe's costs of government include the realty services it provides on its reservation, services which benefit appellant and other lessees and sublessees, as well as the Indian lessors.

In United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit, observing that Indian tribes and the Federal government are dual sovereigns, found it proper to require even the Federal government to resort to tribal court to enforce a Federal statute concerning trespass on tribal lands. As support for its conclusion, the court cited, inter alia, Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987), and National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985), cases in which the Supreme Court, citing the Federal policy of support for tribal self-government, held that tribal remedies must be exhausted before a Federal court may exercise jurisdiction over a dispute arising on the tribe's reservation.

[4] The present case has more immediate implications for tribal self-government than any of the disputes addressed in these Federal court decisions because the matter at issue here is the source of revenue which supports some of the Tribe's governmental functions. There is even more reason, then, for this dispute to be addressed in a tribal forum rather than by this Board. Under Plainbull, there should be no impediment to the interpretation of a Federal statute by the tribal forum. Moreover, the tribal forum is clearly better equipped than the Board to construe the tribal authority under which the Tribal Council acted when it established the fee schedule. The Board finds that, to the extent it has jurisdiction over this appeal, it should abstain in deference to the Tribe's primary jurisdiction over the matter. 18/

17/ The Tribal Council must necessarily have acted pursuant to some tribal authority, as well as any authority which may have been delegated to it by BIA, because the Council's power to act for the Tribe comes from the Tribe, not from BIA. However, the exact nature of the tribal power invoked in this case is not clear.

18/ Appellant has initiated proceedings before the Tribe, at least informally, through its contacts with the Tribal Council and its discussions with the Tribal Planning Commission. Proceedings appear to have stalled, however, after the Feb. 7, 1994, meeting (see footnote 6), presumably because of the pendency of appellant's appeal before the Area Director. There is no indication in the record that tribal proceedings have been completed or that appellant has exhausted its tribal remedies.

The Board does not know whether the Tribe has a tribal court. The Supreme Court has observed, however, that "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed. 19/

_____
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Chief Administrative Judge

19/ All pending motions not addressed in this decision are denied. All arguments not addressed have been considered and rejected.